No. 96-858

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

MICHAEL SALVAGNI, in his official capacity as Gallatin County Attorney,

Petitioner,

—v.—

SUSAN WICKLUND, M.D.; JAMES H. ARMSTRONG, M.D.; LINDSAY RICHARDS, M.D.; SUSAN CAHILL, P.A.; DOUGLAS WEBBER, M.D.; BETH E. THOMPSON, M.D.; MARY STRANAHAN, D.O.; and MARK MILES, M.D., on behalf of themselves and their patients throughout Montana, the surrounding states and Canada,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a statute requiring parental notification for a minor seeking an abortion is invalid if its judicial bypass mechanism does not allow an immature minor to obtain a waiver of parental notification even if the abortion is in her best interests, but only allows such a waiver in the more limited circumstances where parental notification is not in her best interests?

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Respondents Susan Wicklund, M.D., *et al.*, respectfully submit the following brief in opposition to the petition for certiorari filed by Michael Salvagni, the County Attorney for Gallatin County, Montana (hereinafter "petitioner" or "the State"), docketed on November 29, 1996.

COUNTERSTATEMENT OF THE CASE

This case was filed in November of 1993 after a police officer threatened respondent Wicklund with prosecution under the then-existing Montana parental notification law, enacted in 1974, Mont. Code Ann. § 50-20-107(b) (1993) (hereinafter "the 1974 statute"), and after Wicklund was served with a state court subpoena obtained by the office of petitioner Salvagni commanding her to produce the medical records regarding medical procedures and counseling performed at her office on July 21, 1993, the date when one minor purportedly obtained an abortion at her office. The 1974 statute contained no mechanism by which minors could bypass the parental notification requirement. The federal district court granted a temporary restraining order against the 1974 statute on November 30, 1993, and the subpoena was subsequently quashed by the state district court.

In December of 1993, petitioner Salvagni, represented by the Attorney General of Montana, entered into a stipulation for judgment that states that the Montana parental notification law is unenforceable under the decisions of this Court. On December 21, 1993, the district court entered a permanent injunction against enforcement of the 1974 statute based on the stipulation of the parties.

In 1995, the Montana legislature repealed the 1974 statute, and enacted a new parental involvement statute (hereinafter "HB 482" or "the Montana statute").

Respondents filed a supplemental complaint challenging the constitutionality of HB 482 in July of 1995.

Under HB 482, an unemancipated minor who wishes to avoid notice to a parent of an abortion must petition the Montana youth court for a waiver of notice. HB 482 requires the youth court to authorize the minor "to consent to the performance or inducement of an abortion without the notification of a parent or guardian," *see* Pet. 3,[1] in three circumstances:

(1) if the court finds by clear and convincing evidence that the minor is sufficiently mature to decide whether to have an abortion;

(2) if the court finds by clear and convincing evidence that there is evidence of a pattern of physical, sexual, or emotional abuse of the minor by one or both parents, a guardian, or a custodian; and

(3) if the court finds by clear and convincing evidence that "the notification of a parent or guardian is not in the best interests of the petitioner." *See* Pet. 3 (quoting statute).

In their supplemental complaint, respondents challenged, *inter alia*, the adequacy of this bypass procedure. First, respondents argued that a minor will be unable to avoid parental notification even if she is mature or an abortion is in her best interests. Under the Montana Youth Court Act, after a petition is filed in the youth court, a "summons must be served directly to: (a) the youth; (b)

[1]Citations to the text of the petition for writ of certiorari are in the form "Pet. __"; citations to the appendix to the petition are in the form "__a."

his parent or parents having actual custody of the youth or his guardian or custodian, as the case may be; *and* (c) other persons as the court may direct." Mont. Code Ann. § 41-5-502(1) (emphasis added). Thus, at the outset, the minor's parents will receive notice of the proceeding purportedly designed to allow her to waive notice.

Second, respondents argued that an abused minor will be unable to avoid parental notification, even if she is mature or an abortion is in her best interests, because a finding of a pattern of "physical, sexual, or emotional abuse" by the youth court must be reported pursuant to Mont. Code Ann. § 41-3-202, and such a report will sometimes result in an investigation at the minor's home, thus effectively notifying the parents of the minor.

Third, respondents argued that, as to immature minors, the grounds for a waiver of parental notification are too narrow. Instead of requiring the youth court to authorize the minor "to consent to the performance or inducement of an abortion without the notification of a parent or guardian" if an *abortion is in her best interests*, it authorizes the abortion only in the narrower circumstances where *parental notification is not in her best interests*. This difference had been condemned by the court of appeals in which Montana is situated in *Glick v. McKay*, 937 F.2d 434, 438-39 (9th Cir. 1991), four years before the Montana legislature enacted HB 482.

The district court reached only the third of these challenges to the adequacy of HB 482's judicial bypass mechanism. It held that the bypass mechanism of a parental notification statute must satisfy the same criteria as a parental consent statute, as laid out in *Bellotti v. Baird*, 443 U.S. 622 (1979), and that HB 482 failed to comply with the best interests criterion set out in *Bellotti* for

immature minors. Thus, the district court permanently enjoined HB 482.

On appeal, the court below held that it was bound by the holding in *Glick*, and accordingly affirmed the district court's decision. Petitioner's suggestion for rehearing en banc -- a request that the court of appeals overrule *Glick* -- was denied with no active judge requesting a vote on whether to rehear en banc. *See* 34a.

REASONS FOR DENYING THE WRIT

In seeking review by this Court, the State has failed to establish any of the factors that weigh in favor of a grant of certiorari. On the contrary, the decision of the court below is in conflict neither with the decisions of this Court nor with the decisions of other United States courts of appeals. Further, no important question of federal law is raised by this case "that has not been, but should be, settled by this Court," Sup. Ct. R. 10(c), because strong alternative grounds support the result reached by the court of appeals. Accordingly, the petition should be denied.

I. THE DECISION OF THE COURT OF APPEALS IS CONSISTENT WITH THIS COURT'S DECISIONS AND WITH THE REASONING UNDERLYING THEM.

The State argues that this Court should grant its petition because the decision of the court of appeals is "incompatible" with this Court's decisions in *Bellotti v. Baird*, 443 U.S. 622 (1979), *Hodgson v. Minnesota*, 497 U.S. 417 (1990), and *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990) (*Akron II*). Contrary to the State's argument, however, nothing in the

holdings in these cases is inconsistent with the decision of the court of appeals.

A. No Decision Of This Court Has Held That A Parental Notification Statute May Use A Different Standard For Bypassing Parental Involvement Than Is Required For A Parental Consent Statute.

In *Bellotti*, the plurality opinion of Justice Powell outlined the bypass procedure that a State must establish in connection with a parental consent statute for abortion. In relevant part, the plurality opinion stated:

> If, all things considered, the court determines that an abortion is in the minor's best interests, she is entitled to court authorization *without any parental involvement*.

Id., 443 U.S. at 648 (emphasis added). Thus, under a consent statute, such a minor has a right to obtain court authorization for the abortion "without first consulting or notifying her parents," *id.* at 647, even if *parental involvement or notification* would be in her best interests. The opinion correctly observed that mere notice of the bypass proceeding might result in "parents' efforts to obstruct both an abortion and access to court." *Id.* That is, even if the minor obtained judicial authorization for the abortion, notification of a parent might result in denial of "an *effective* avenue of relief for some of those who need it most." *Id.* (emphasis added). It is thus entirely consistent with *Bellotti* to require, as did the court below, that a judicial bypass in a parental notification statute must waive parental notification if the *abortion* is in the minor's best interests.

Under *Bellotti*, where a State requires parental consent for abortion, it must allow the minor to obtain a bypass of parental consent without any notice to the parents whatsoever. Indeed, the fact that the Massachusetts statute at issue in *Bellotti* did not allow for a bypass without notice to parents was the chief ground upon which the plurality invalidated the statute. *Id.* at 647. If, in the case of an immature minor, an abortion is in her best interest, the state court inquiry is over, and authorization for the abortion *must* be given.[2]

The State next argues that the decision of the court of appeals is "at odds with" this Court's decisions in *Hodgson* and *Akron II*. *See* Pet. 9. Neither *Hodgson* nor *Akron II*, however, involved a challenge to the judicial bypass standards applicable to immature minors. Thus, the State's argument that the Court in *Hodgson* and *Akron II* held *sub silentio* that the *Bellotti* standards are not required in parental notification statutes is misplaced. Whether this Court was "unaware of the nature of the best interests standard in the Ohio law" or not, *see* Pet. 12, is irrelevant.

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[2]A decision invalidating Louisiana's parental consent statute illustrates this point. In *Causeway Medical Suite v. Ieyoub*, 905 F. Supp. 360 (E.D. La. 1995), *appeal pending*, No. 95-31178 (argued Sept. 5, 1996), the district court held unconstitutional 1995 amendments to Louisiana's statute requiring parental consent for abortion. One of the constitutional flaws identified by the court was that the statute, which included a judicial bypass of parental consent, required "that the juvenile court notify the parents of immature minors who have applied for judicial bypass if it is determined to be in the best interest of the minor to do so." *Id.* at 365. In essence, Louisiana had adopted *both* a parental consent law *and* a parental notification law: to avoid parental consent, the minor must seek a judicial bypass; but, in the bypass proceeding, if the court found the minor immature, her parents would be notified if notification was in her best interests, even if the abortion itself was in her best interests.

A conflict between a decision of this Court and that of a court of appeals is not created because this Court might have been "aware" of a similar provision in another statute.[3] A conflict requires a *holding* of this Court -- or at least some analysis of the question. No opinion of this Court since *Bellotti*, however, has purported to analyze the standard applicable to immature minors seeking authorization for an abortion under a parental notification statute.

Finally, the State argues that a different best interests standard in parental notification statutes "makes practical sense because under a notification statute the minor, not a parent or a court, possesses final decisionmaking power concerning whether an abortion is warranted and because the bypass proceeding's sole purpose is to determine whether waiver of the *notice* requirement is appropriate." Pet. 17. Practically, however, notice to a parent is often tantamount to delegation of a veto power, because mere notice might result in "parents' efforts to obstruct [the] abortion . . . ." *Bellotti*, 443 U.S. at 647. Indeed, this Court's opinion in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), recognized that a spousal notification requirement for abortion "is . . . likely to prevent a significant number of women from obtaining an abortion." *Id.* at 893. It is likewise true that a parental notification requirement, because of the potential for "verbal

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[3]Thus, the State's argument that a conflict exists between this Court's opinions and that of the court below is based on even *less* than its argument that there is a conflict between the decision of the court below and that of another United States court of appeals. As discussed below, the latter argument improperly relies on dicta from another court of appeals to construct a conflict, *see infra* at Point II; here the State relies not even on dicta, but on an unspoken "awareness" of an issue not raised by the parties *or* analyzed by the Court.

harassment, threats of future violence, the destruction of possessions, physical confinement to the home, the withdrawal of financial support, or the disclosure of the abortion to family or friends," *id.*, is likely to prevent some minors from obtaining abortions, as surely as if the state awarded the parents the power of consent.[4] As this Court wrote in *Casey*, in words equally applicable to parental notification:

> Whether the prospect of notification itself deters such women from seeking abortion, or whether the husband, through physical force or psychological pressure or economic coercion, prevents his wife from obtaining an abortion until it is too late, *the notice requirement will often be tantamount to the veto found unconstitutional in Danforth.*

505 U.S. at 897 (emphasis added). Thus, it makes *practical* sense to apply the same best interests standard to both consent and notification statutes as the Court below did, because notice often effectively delegates a veto power to a parent. *See Planned Parenthood v. Miller*, 63 F.3d 1452, 1458-60 (8th Cir. 1995) (concluding that parental notification is tantamount to parental consent and requires a

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[4]In addition, minors face physical and sexual abuse. While HB 482 purportedly contains an "exception" for cases in which there is "evidence of a pattern of physical, sexual, or emotional abuse" of the minor, Mont. Code Ann. § 50-20-212(5)(a), HB 482 also requires the youth court to make a report of the abuse pursuant to Mont. Code Ann. § 41-3-202, which may result in an investigation at the minor's home. HB 482, § 9(2)(b). The report and investigation that will ensue will result in constructive notification to the minor's parents. Such constructive notification was condemned by Justice O'Connor's controlling opinion in *Hodgson v. Minnesota*, 497 U.S. 417, 460 (1990) (O'Connor, J., concurring).

similar bypass), *cert. denied*, 116 S. Ct. 1582, 1583 (1996).

B. The Montana Statute's Best Interests Standard For Immature Minors Impermissibly Narrows The Class Of Minors Able To Obtain An Abortion Without Parental Involvement And Is Based On A Misunderstanding Of The Function Of The Bypass.

The best interests standard employed by HB 482 will prevent some minors from obtaining an abortion without parental involvement even though, under the correct *Bellotti* test, they would obtain judicial approval for an abortion. Some immature minors whose best interests may dictate an abortion may be prevented from obtaining the procedure because a court concludes that notification of their parents is in their best interests. As the court of appeals wrote in *Glick v. McKay*, "The best interests of a minor female in obtaining an abortion may encompass far more than her interests in not notifying a parent of the abortion decision." *Id.*, 937 F.2d at 439. Other courts of appeals have, in dicta, recognized the difference between the two standards. *Barnes v. Mississippi*, 992 F.2d 1335, 1341 (5th Cir.) ("parental consent statute using parental notification as the guidepost for the child's best interests might well be unconstitutional"), *cert. denied*, 114 S. Ct. 468 (1993); *Planned Parenthood v. Miller*, 934 F.2d 1462, 1477 n.21 (11th Cir. 1991) (recognizing that the two standards may lead to different results, but suggesting that difference is not "constitutionally significant"). The *Glick* reasoning is sound and consistent with this Court's decisions for three reasons.

First, *Glick* correctly recognizes that the immature minor's best interests in having an abortion include "far more" than her interests in avoiding notice to her parents. For example, factors indicating that an abortion is in the minor's best interests may include the medical problems she may experience during pregnancy and childbirth because of her physical immaturity; other physical and emotional health problems unrelated to her pregnancy; her capacity to be a parent; or the interruption of her education that would be caused by pregnancy, childbirth, and motherhood. *See Bellotti*, 443 U.S. at 642 ("[T]here are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible."). These factors have no bearing on whether it is in her best interests to notify or consult her parents, and are therefore irrelevant under HB 482.

Second, the evidentiary burden on the immature minor is significantly higher if she must prove by clear and convincing evidence that parental notification is not in her best interests than if she must prove, by the same standard, that an abortion is in her best interests. By virtue of her immaturity, it appear may at the outset of the youth court hearing that she will benefit from parental consultation. To prove that notification is not in her best interests, an immature minor will have to overcome this presumption. However, the Montana statute forecloses her from presenting the most persuasive evidence that notice is not in her best interests: evidence of physical, sexual or emotional abuse. Because HB 482 requires the youth court to report such information to the appropriate state authorities, such evidence, if presented, may result in a report and a state inquiry at her home. *See* n.4 *supra*. Furthermore, while she may present evidence of a generalized fear of parental retribution or obstruction, such a fear, though well-founded, may not constitute "clear and convincing evidence."

Indeed, an immature minor may have little or no "evidence" that notification is against her best interests.

On the other hand, under the proper *Bellotti* test, the immature minor will generally be better able to show that an abortion is in her best interests, for the presumption is likely that an abortion is in her best interests. Her physical and emotional immaturity itself may be grounds to find that an abortion is in her best interests, as may be her physical and emotional health. The obvious harm to the course of her education, and the consequent harm to her future, are also relatively easy to prove. Of course, specific problems she may have at home if her parents discover she is pregnant also bear on whether the abortion is in her best interests.[5]

Finally, because HB 482 uses the incorrect standard, the determination of whether to authorize an abortion for an immature minor may be made without *any* consideration of whether the procedure is in her best interests.[6] This goes

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[5]By selecting *one* of the factors that a court considers in its *Bellotti* assessment, and elevating it as the *only* factor to be considered, HB 482 necessarily increases the minor's burden of proof. It is axiomatic that removal of one ground for meeting a burden of proof increases that burden. For example, in a custody dispute where the best interests of the child governs, if all factors other than ability to provide financial support are removed from consideration, the burden of proof on a poorer spouse changes decisively, even though, with a more global best interests inquiry, that spouse might prevail. *Cf. Montana v. Egelhoff*, 116 S. Ct. 2013, 2023 (1996) (opinion of Scalia, J., announcing the judgment of the court) ("by excluding a significant line of evidence that might refute *mens rea*, the statute made it easier for the State to meet the requirement of proving *mens rea* beyond a reasonable doubt").

[6]Indeed, if the waiver of notice is granted, the abortion may be performed simply because parental notification was not in her best

(continued...)

against the purpose of the bypass proceeding: the court is to function as a surrogate for a parent, considering, as the parent would, whether the *abortion* is in the minor's interest.[7] HB 482 changes the role of the judicial bypass, so that whether the minor obtains an abortion depends exclusively on her relationship with her parents, and not at

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[6](...continued)
interests, even if, for some reason, the abortion itself may *not* be in her best interests. As this Court recognized in *Bellotti*:

> [A]n abortion may not be the best choice for the minor. The circumstances in which this issue arises will vary widely. In a given case, alternatives to abortion, such as marriage to the father of the child, arranging for its adoption, or assuming the responsibilities of motherhood with the assured support of family, may be feasible and relevant to the minor's best interests.

Id., 443 U.S. at 642-43. Under HB 482, exploration of alternatives to abortion, the support of the father, and numerous other factors that may weigh *against* the abortion being in the minor's best interests, are improperly excluded from consideration.

[7]The State argues that "nothing precludes a notice bypass decisionmaker from considering the appropriateness of the abortion when it determines whether parental notification should occur, any more than a parental consent bypass decisionmaker . . . is foreclosed from concluding that judicial consent to an abortion should not be given until parental consultation has taken place." Pet. at 18 n.5. While it may be argued that nothing *precludes* some consideration of whether the abortion is in the minor's best interests, the Montana statute does not *require* such consideration, and therefore does not serve the function envisioned for the bypass: to serve as an evaluation, in the case of an immature minor, of whether the abortion is in her best interests.

In addition, the State points to Louisiana's new parental consent law as "codif[ying] this aspect of *Bellotti*." Pet. 18 n.5. Far from "codifying" *Bellotti*, the Louisiana statute is *invalid* under *Bellotti* for the very reason the State touts it. *Causeway*, 905 F. Supp. at 365.

all on her need for the procedure. As this Court indicated in *Hodgson*, "[T]he justification for any rule requiring parental involvement in the abortion decision rests *entirely* on the best interests of the child." 497 U.S. at 454 (emphasis added). By shifting emphasis away from the best interests of the child in having the abortion, HB 482 violates the purpose of the bypass procedure.

II. THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH THAT OF ANY OTHER COURT OF APPEALS.

The State argues that the decision of the court below is in conflict with the decision of the United States Court of Appeals for the Eleventh Circuit in *Planned Parenthood v. Miller*, 934 F.2d 1462 (11th Cir. 1991). The State relies, however, entirely on a footnote in the opinion in *Miller* that is clearly dicta. But "[b]reath spent repeating dicta does not infuse it with life." *Metropolitan Stevedore Co. v. Rambo*, 115 S. Ct. 2144, 2149 (1995).

The Georgia parental notification statute at issue in *Miller*, like the Montana statute whose invalidation was affirmed by the court below, provides that an immature minor is entitled to a waiver of parental notification if the state court "finds . . . that notice to her parents would not be in her best interests." *Id.* at 1468 (citing Ga. Code Ann. § 15-11-114(c)(2)).[8] In addressing this aspect of the

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[8]Unlike HB 482, however, the Georgia parental notification law does not require proof "by clear and convincing evidence" that parental notification is not in the minor's best interests. Nor does the Georgia statute specifically require, as does HB 482, that the state court report an allegation of abuse if that is the basis for a waiver of notice. *See* Ga. Code Ann. § 15-11-114. Therefore, a minor seeking a waiver of
(continued...)

statute, the court of appeals wrote that "only one element of the judicial bypass procedure -- *an element not contested by Planned Parenthood* -- fails precisely to fit the *Bellotti* language." *Id.* at 1477 n.21 (emphasis added). Because the issue was not contested by the parties, the court's comments are the epitome of dicta. *See, e.g., Nichols v. Fearson*, 32 U.S. (7 Pet.) 103, 107 (1833) ("the point . . . was not argued, and the opinion expressed by the learned judge was, at best, but an obiter dictum"); *Webb v. State of Alabama, Dept. of Pensions and Security*, 850 F.2d 1518, 1521 n.2 (11th Cir. 1988) (family court statement was "dicta and not a holding on the merits" in part because "the issue had not been argued by the parties"). Indeed, the court in *Miller* was without jurisdiction to decide the constitutionality of an aspect of the statute that the plaintiffs there did not challenge. *See, e.g., Williams v. Zbaraz*, 448 U.S. 358, 367 (1980) (district court "exceeded its jurisdiction under Art. III in declaring the Hyde Amendment unconstitutional" where "[n]one of the parties . . . ever challenged the validity of the Hyde Amendment").

Dicta by one court of appeals is not an appropriate basis for finding a conflict between two courts of appeals. "[T]here must be a real or 'intolerable' conflict on the same matter of law or fact, not merely an inconsistency in dicta or in the general principles involved." ROBERT L. STERN, *et al.*, SUPREME COURT PRACTICE § 4.3, at 167 (7th ed.

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[8](...continued)
notice under the Georgia law need not fear that if she alleges abuse as a basis for a claim that parental notification is not in her best interests, the court hearing her request for a waiver will set in motion a process that may result in notice to her abusive parent after all. HB 482 imposes precisely this deterrent on abused minors, and gives them no certain way to obtain an abortion without parental involvement. *See* n.4 *supra*.

1993) (footnote omitted); *see also* Stewart A. Baker, *Symposium on Supreme Court Advocacy: A Practical Guide to Certiorari*, 33 CATH. U. L. REV. 611, 618 (1984) ("The split should arise from the courts' holdings; dicta, after all, may be reconsidered."). Thus, there is no conflict between the decision of the court below and "the decision of another United States court of appeals on the same important matter." Sup. Ct. R. 10(a).

III. NO ISSUE OF NATIONAL IMPORTANCE IS RAISED BY THIS CASE.

The State argues that this case involves "an issue of national importance [that] has been resolved without analysis of controlling opinions of this Court." Pet. 19. This argument is incorrect for two reasons.

First, the decision of the court of appeals, contrary to the implication by the State, does not affect the "eleven other states, all but one outside the Ninth Circuit, [that] have comparably-worded best interests provisions." *See* Pet. 9. The one State identified by the petitioner within the Ninth Circuit that has a "comparably-worded best interests provision" is Nevada, *see* Pet. at 16 n.3; but this statute was invalidated five years ago in *Glick*, and will remain invalid however this Court resolves the petition, because it was invalidated on grounds unrelated to its best interests standard. *See Glick*, 937 F.2d at 440-41 (Nevada statute's bypass procedure "does not meet the *Bellotti* expediency criterion").[9] The other states identified by the petitioner

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[9]The State also suggests that three parental consent laws using a standard similar to the Montana statute's are in jeopardy. Pet. 17 n.4 (listing Arizona, Michigan and Louisiana statutes). But the State appears to concede that, in the case of a consent statute, the standard
(continued...)

are outside the Ninth Circuit, and courts there will not be bound by the decision of the court below even if this Court denies the petition, for a denial of certiorari is accorded no precedential value. *United States v. Carver*, 260 U.S. 482, 490 (1923) ("The denial of a writ of certiorari imports no expression upon the merits of the case, as the bar has been told many times."). Indeed, it is appropriate to deny the petition to await "further study" in the lower courts of the issue presented by the petition, study which may occur if the statutes in states outside the Ninth Circuit are challenged. *See McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J., respecting denial of certiorari).

In addition, the outcome of this case does not rest entirely on the issue raised by the petition, because there are two alternative grounds upon which this Court could affirm the decision of the court below. Ultimately, respondents would be likely to prevail on these grounds. First, this Court has disapproved a judicial bypass mechanism using a juvenile court that resulted in automatic notice to parents -- a mechanism identical to that of the Montana statute. *City of Akron v. Akron Ctr. for Reproductive Health*, 462 U.S. 416, 441 n.31 (1983); *see also Indiana Planned Parenthood v. Pearson*, 716 F.2d 1127, 1139 (7th Cir. 1983) ("[i]t would be unconstitutional for the juvenile court to allow parents to obtain indirect

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[9](...continued)
should be whether the abortion is in the minor's best interests. *See* Pet. at 16-17. In any event, two of the three statutes identified by the State are under injunction. *See Causeway Medical Suite v. Ieyoub*, 905 F. Supp. 360 (E.D. La. 1995) (enjoining Louisiana parental consent statute on several grounds aside from best interests standard); *Planned Parenthood of Southern Arizona v. Neely*, 942 F. Supp. 1578 (D. Ariz. 1996) (enjoining Arizona parental consent statute on several grounds aside from best interests standard).

notice of the waiver petition"). Second, HB 482's indirect notice to minors who prove a pattern of abuse renders it unconstitutional. *Hodgson v. Minnesota*, 497 U.S. 417, 460 (1990) (O'Connor, J., concurring in part and concurring in the judgment in part); *see also Planned Parenthood v. Miller*, 63 F.3d 1452, 1461 (8th Cir. 1995) ("[i]n practice . . . South Dakota's abuse exception will sometimes result in parental notification, even if after-the-fact"), *cert. denied*, 116 S. Ct. 1582, 1583 (1996). Thus, granting the petition would decide the "best interests" issue in a case where it need not be decided, since the statute, regardless of the constitutionality of Montana's best interests standard, is invalid.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

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Respectfully submitted,

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